OPINION ENTERED: NOVEMBER 30, 2012

CLAIM NO. 201101566

ENTERPRISE MINING PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JOHNNY WILDER
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

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BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. Enterprise Mining ("Enterprise") appeals from the June 26, 2012 Opinion and Order rendered by Hon. William J. Rudloff, Administrative Law Judge ("ALJ"), finding Johnny Dale Wilder ("Wilder") permanently totally disabled as a result of cumulative trauma manifesting on April 27, 2011. Enterprise also appeals from the July 16, 2012 Opinion and Order on Reconsideration. On appeal, Enterprise argues the ALJ erred by rendering his decision

without considering the deposition transcript of Dr. Richard Sheridan. Enterprise also argues the ALJ erred in relying on a non-work-related disability in finding Wilder is totally disabled. Enterprise also maintains the finding of total disability is not based upon substantial evidence. We find it necessary to vacate the ALJ's decision and remand this matter.

Wilder filed a Form 101 on December 5, 2011, alleging injuries to his back, elbows, knees, ankles, shoulders, hands, left wrist and left eye manifesting on April 27, 2011, as a result of cumulative trauma due to his work as a heavy equipment operator with Enterprise. Wilder also filed a Form 103 alleging hearing loss. The ALJ consolidated the claims by order dated January 19, 2012.

Since the issue on appeal is limited, a detailed recitation of the evidence is not necessary. This appeal relates to the deposition of Dr. Sheridan taken on June 18, 2012, one day prior to the hearing. At the conclusion of the hearing held on June 19, 2012, the following exchange took place:

> ALJ: All right, both attorneys have done a very good job. I have prepared a Hearing Order. I want both of you to look at the proof and make sure all proof is in the record. First of all, for the plaintiff.

> Mr. Vanover: Thank you, Judge. Judge, we took a deposition of Dr. Sheridan yesterday.
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> ALJ: All right, include that in there. Let's make sure all the evidence is in the record and is in the Hearing Order. Okay, I have signed the Hearing Order and both attorneys have signed the Hearing Order and agreed to the contents of the Hearing Order and I will give a copy of the Hearing Order to both attorneys.
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> Mr. Vanover: Thank you, Judge.
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> Mr. Damron: Thank you, Judge.
>
> ALJ: And, by agreement, the record is now closed and the case submitted for decision, and I will get out a decision as soon as possible. Thank you very much.
>
> Mr. Vanover: Thank you, Judge.
>
> Mr. Damron: Thank you Judge.

The June 19, 2012 hearing order contains the following information:

> The following items have been filed by the defendant(s) to be considered as evidence:
>
> ***Depo. of Plaintiff, Rpts of Dr. Richard Sheridan & Rick Pounds, University Evaluation Report; Depo of Dr. Sheridan[.]***[1]

[1] The bolded italicized part of the quote represents the handwritten information on the Hearing Order Form.

Wilder filed his position statement on June 21, 2012, making no reference to Dr. Sheridan's report or testimony.

On June 25, 2012, Enterprise filed its position statement, which included the following summary of Dr. Sheridan's deposition testimony:

> Dr. Sheridan testified by deposition on September [sic] 18, 2012. His testimony was consistent with his report. He did explain that ankylosing spondylitis is the same as Marie Strumpell disease. He described this as a type of arthritis, the cause of which is unknown. He testified that it typically strikes males nine times more often than females and starts usually between the ages of 20 and 40 years. He testified that the condition involves the entire spine as well as other joints including sacroiliac joints, the knees, elbows, ankles, etc. As the disease progresses, it eventually causes fusion of the entire spine and results in a stooped posture. Dr. Sheridan testified that the cause of the condition is unknown but there are no known studies linking causation to work or activity. He testified that treatment for the condition consisted of surgeries, including possible hip and shoulder replacement surgeries at some point, and anti-inflammatory medications and other medications. Those medicines include Enbrel, the medication being prescribed for the plaintiff by Dr. Pampati. He testified that this is typically used only to treat inflammatory processes such as rheumatoid arthritis, psoriatic arthritis and ankylosing spondylitis. Dr. Sheridan testified that all of plaintiff's symptoms and complaints really are consistent with that diagnosis, including the finding that

> plaintiff's respiratory excursion is only one inch while the normal is four inches. He explained that respiratory excursion is the expansion of the ribs and chest when breathing in, and among the first joints attacked by ankylosing spondylitis are ribs joining the spine in the thoracic region.
>
> Dr. Sheridan disagreed with Dr. Johnson's diagnosis of cumulative trauma to the neck and back, finding no evidence of that and noting that the diagnosis of ankylosing spondylitis explains all of the plaintiff's physical findings and symptoms in and of itself. He found no work related condition and no work related impairment rating or restrictions. He did note numerous findings on his examination were consistent with Dr. Johnson's diagnosis of significant behavior pattern, especially plaintiff's complaints of reduced sensation in his left upper extremity, left side of his face and left lower extremity which followed no dermatome pattern and which had no explanation from a physical standpoint.

The actual deposition transcript was not filed in the record until July 23, 2012.

The ALJ rendered his Opinion and Order on June 26, 2012, summarizing Dr. Sheridan's report as follows:

> **RICHARD SHERIDAN, M.D.**, conducted an independent medical evaluation of the plaintiff on May 30, 2012 for the defendant. He testified by deposition June 18, 2012. Dr. Sheridan diagnosed ankylosing spondylitis, or Marie-Strumpell disease. He opined that none of the plaintiff's symptoms related to his work. Dr. Sheridan declined to assess any permanent impairment to the

> plaintiff. He opined that the plaintiff will require future non-work-related medical care for his arthritic condition.

Relying on the opinions of Dr. Johnson, the ALJ found Wilder sustained injuries caused by the work incident and that, prior to being informed of the work-relatedness of his symptoms, Wilder had no history of treatment or symptoms. The ALJ determined Wilder had a 9% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He explained:

> In the present case the ALJ considers the plaintiff's debilitating physical injuries, his limited education and lack of transferrable skills, alongside his work history. The plaintiff's injuries necessitate that he cease working and use a walker or wheelchair just to get around. In spite of his occupational youth, the plaintiff has a steady work history. Thus the ALJ finds most persuasive the opinions of Dr. Johnson and Mr. Ellis. The ALJ is persuaded that if this plaintiff could work, he would be working. I therefore find that the plaintiff is permanently and totally disabled.

Enterprise filed a petition for reconsideration on July 5, 2012, arguing the ALJ committed a patent error by rendering the decision without reviewing the transcript of Dr. Sheridan's deposition. Enterprise noted the ALJ based his finding in part upon Dr. Johnson's prescription for a

walker or wheelchair. However, Enterprise argued the use of the walker and/or wheelchair was related to Dr. Johnson's diagnosis of ankylosing spondylitis, which Dr. Sheridan explained is not work-related.

The ALJ rendered his Opinion and Order on Reconsideration on July 16, 2012, relevant portions of which are as follows:

> 6. The defendant argues that although the defendant took the deposition of Dr. Sheridan on June 18, 2012, defendant's attorney had not received his copy of the deposition transcript by June 26, 2012. However, the Opinion and Order dated June 26, 2012 contains an analysis of Dr. Sheridan's medical report and his June 18, 2012 deposition. In addition, the defendant's Position Statement dated June 19, 2012 comprehensively reviews Dr. Sheridan's medical report dated May 30, 2012 and his deposition testimony, which was consistent with his medical report. Further, addition [sic], at the hearing on June 19, 2012, the defendant's attorney argued Dr. Sheridan's medical opinions.
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> 7. In light of the above, it is clear that Dr. Sheridan's medical opinions, as contained in his medical report and deposition, were thoroughly and carefully reviewed by the Administrative Law Judge before rendering the Opinion and Order dated June 26, 2012.

The ALJ then indicated that, based upon Wilder's sworn testimony and the opinion of Dr. Johnson, as well as the

holding in Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), he made the factual determination Wilder is now permanently and totally disabled as a result of his cumulative work trauma. Accordingly, the ALJ denied Enterprise's petition for reconsideration.

On appeal, Enterprise argues the ALJ acted in excess of his authority by rendering a decision without considering Dr. Sheridan's deposition testimony. Enterprise notes Dr. Sheridan's deposition testimony was much more explanatory than his report regarding the diagnosis of ankylosing spondylitis, its non-work–related origin, and its effects. Enterprise argues the ALJ could not adequately weigh the conflicting medical evidence without viewing all of the evidence.

Enterprise argues the ALJ erred by relying on non-work-related disability in finding Wilder permanently totally disabled, and the finding of a permanent total disability is not based upon substantial evidence. Enterprise further argues the evidence established Wilder's ankylosing spondylitis is not caused by work and should not have been considered in determining the extent of Wilder's disability. Enterprise notes the diagnosis necessitated Walker's use of a walker and/or wheelchair and the ALJ's finding of total

disability was based in part on the use of the walker and/or wheelchair.

The ALJ, at the hearing, permitted the submission of Dr. Sheridan's deposition as evidence. There was no objection to consideration of the deposition. The deposition was listed as evidence on the hearing order signed by the parties. Once the ALJ permitted the submission of the deposition, he was bound to review it prior to rendering his decision.

All parties to a workers' compensation dispute are entitled to findings of fact based upon a correct understanding of the evidence submitted during adjudication of the claim. Where it is demonstrated the fact-finder may have held an erroneous understanding of relevant evidence in reaching a decision, the courts have authorized remand to the ALJ for further findings. *See* Cook v. Paducah Recapping Service, 694 S.W.2d 684 (Ky. 1985); Whitaker v. Peabody Coal Company, 788 S.W.2d 269 (Ky. 1990).

It was improper for the ALJ to rely on the summaries of Dr. Sheridan's deposition rather than reviewing the transcript. Counsel's account of the deposition is not evidence, and the ALJ could not properly rely upon the summary in lieu of reviewing the deposition transcript. Since the ALJ did not review the deposition testimony, it

cannot be said the ALJ had a correct understanding of that evidence.

The ALJ's decision was based primarily upon the opinions of Dr. Johnson. Without reviewing Dr. Sheridan's criticism of those opinions, the ALJ could not accurately determine whether Dr. Johnson's opinions were refuted.

Enterprise is entitled to a decision based upon the entirety of the evidence permitted to be filed in the claim. Since Dr. Sheridan's opinions expressed in his deposition testimony may impact the ALJ's findings regarding the extent of Wilder's disability, it is necessary to vacate the ALJ's findings and remand this matter for the ALJ to consider the transcript of Dr. Sheridan's deposition testimony and make findings based upon review of all of the evidence.

The Board's decision should not be interpreted as requiring any particular findings or outcome on remand. Rather, we find it necessary to vacate and remand for a decision based upon a complete examination of the evidence.

Accordingly, the June 26, 2012 Opinion and Order rendered by Hon. William J. Rudloff and the July 16, 2012 Opinion and Order on Reconsideration are **VACATED** and this matter is **REMANDED** for entry of an amended Opinion and Order in conformity with the views expressed herein.

ALL CONCUR.

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